In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 772

TELEPHONE NEWS SYSTEM, INC., APPELLANT

v.

ILLINOIS BELL TELEPHONE COMPANY AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MEMORANDUM FOR THE UNITED STATES

1. This is an appeal from a judgment of a statutory three-judge court, sitting in the Northern District of Illinois, dismissing appellant's complaint which sought an injunction permanently restraining the Illinois Bell Telephone Company from terminating appellant's telephone service.

The suit attacked the constitutionality of 18 U.S.C. 1084(d) which provides:

> When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for

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> the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

Appellant, a corporation, used its telephones solely to give out recorded race-result information from the major race tracks throughout the country—including the mutuel price paid on the winning horse. These race results were furnished without charge to any person who dialed its number.[1] Appellant's sole source of income was received from the Illinois Sports News Company which printed racing publications known as "scratch sheets".

On April 25, 1962, Assistant Attorney General Herbert J. Miller, Jr., acting under 18 U.S.C. 1084(d), requested the telephone company to discontinue appellant's telephone service after giving it reasonable notice on the ground that the telephone facilities "are

[1] Until April 30, 1962, appellant also furnished, prior to the races, "scratches", *i. e.*, the names of the horses withdrawn from competition before the races.

being and will be used for the transmission and receiving of gambling information in interstate commerce in violation of Federal law". On April 27, 1962, the telephone company notified appellant that, in compliance with the letter of the Assistant Attorney General, it intended to discontinue telephone service on May 5, 1962. Appellant then filed its complaint for injunctive relief, claiming that its activities did not violate 18 U.S.C. 1084(d) and that the statute, if applicable, violated the United States Constitution. The court entered a temporary restraining order and the United States intervened as a party.

A single judge, following a hearing, determined that appellant used its telephone facilities to furnish betting information, that this information was used by a professional gambler and that nothing in the record indicated a legal use for this information. He concluded that appellant transmitted gambling information in interstate commerce "in violation of Federal, State, or local law", finding specifically that the information violated Section 28–1(a)10 of the Illinois Criminal Code of 1961. The district court then ordered a statutory three-judge court convened to rule on appellant's constitutional contentions. 210 F. Supp. 471. Before the three-judge court, appellant contended, *inter alia,* that Section 1084(d) was unconstitutional because it authorized a criminal prosecution under the guise of a civil procedure. The court below rejected this argument. Relying on *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, it found that the congressional purpose in enacting this legislation was

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to prevent the continued transmission of information needed for professional gambling. 220 F. Supp. 621.

2. In view of the fact that the statute involved, 18 U.S.C. 1084(d), is a new one and the matter of first impression, the government did not file a motion to affirm. After further study, however, we are persuaded that this appeal does not present a substantial question which would warrant plenary review by this Court. Our reasons for this conclusion are as follows:

a. In this case, the statute was applied to a telephone used for no purpose other than providing the results of horse races. As Judge Will said, "there is nothing in the record of this case indicating any lawful use of plaintiff's facilities." Appellant had no right to the continued illegal use of plaintiff's telephones.

Appellant's principal argument is that 18 U.S.C. 1084(d) is unconstitutional because it is in actuality a criminal sanction. The court below properly concluded that the legislative aim in enacting subsection (d) was regulatory and not penal. Contrary to petitioner's contention, subsection (d) does not require that the user of the facility be guilty of a wagering law violation. Under subsection (d) a common carrier must withdraw or deny communication facilities used or intended for a use which will assist the violation of any wagering law. The section is designed to restrict the transmission of gambling information—of the raw material needed for illicit wagering. In a different section of the statute, 18 U.S.C. 1084(a), Congress did provide a criminal sanction for persons engaged in the wagering business who

knowingly transmit in interstate commerce wagers or information assisting in the placing of bets. The provision for removal of the telephones in 1084(d) was, it is apparent, designed as a prophylactic or regulatory measure.

The legislative history supports this conclusion. Section 1084 was a "marriage of two pending bills", S. 1656 and S 528 in the 87th Congress, 107 Cong. Rec. 13900–13902. As introduced, S. 1656 would have made it a crime for anyone to furnish any wire communication facility with intent that it be used for the transmission in commerce of wagers or wagering information. It contained no provision similar to subsection (d). At the hearing on this bill, telephone company representatives objected insofar as the bill imposed criminal penalties. They suggested legislation similar to S. 528, a bill without any criminal sanctions, authorizing the removal of their facilities upon notification by a law enforcement official of illegal use and relieving them of civil liability if facilities were removed pursuant to this procedure. Hearings on S. 1653–1658, 1665, Committee on the Judiciary, United States Senate, 87th Cong., 1st Sess., pp. 37–46. The Senate Committee then added as an amendment language derived from S. 528—the part of the statute which is now subsection (d). It stated that this provision "will provide additional assistance to the States in preventing the transmission of gambling information". S. Rep. No. 588, 87th Cong., 1st Sess. p. 2.

b. Appellant makes two other contentions: (1) That evidence that a particular gambler used appellant's facilities in a period before October 1961 was inadmis-

sible because the use occurred prior to the effective date of Section 28–1(a)(10) of the Illinois Code, the State statute found by the court to have been violated by appellant's activities; and (2) that this State statute, in prohibiting the transmission of betting information, is unconstitutional because it violates the guarantees of free speech and discriminates against appellant.

Neither of these arguments is substantial. The testimony that the information was used by a gambler merely demonstrated the obvious—that the service was one designed to aid illicit wagering. Applied to the facts of this case, the prohibition against the use of telephone facilities to transmit wagering information neither violates the First Amendment nor discriminates against appellant's business since the telephones were used only to transmit wagering information. The singleness of purpose in appellant's use sharply distinguishes this situation from one where the results of races are printed in a newspaper of general coverage and circulation.

CONCLUSION

For the reasons stated, we believe that the Court may deem it appropriate to affirm the judgment without further argument.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

MARCH 1964.

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